No. 6536

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LEE GET NUEY,
Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration for the Port of San Francisco,
Appellee.

BRIEF FOR APPELLANT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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This is an appeal from an order and judgment of the District Court of the United States, in and for the Northern District of California, Southern Division, dismissing appellant's petition for a writ of habeas corpus and denying to appellant any relief in connection therewith.

The citizenship of the father of the detained person is admitted and the only question to be considered is whether or no the detained person is the lawful natural son of his alleged father.

In view of the frivolousness of the contention that there are material discrepancies and inconsistencies presented by the immigration record, we believe that we should discuss first the facts applicable to this

proceeding before referring to the various cases establishing the law as to the rights of the appellant who is hereinafter referred to as the detained person.

The petition was amended by setting forth in full as "Exhibit A" and "Exhibit B," being the summary of the proceedings had before the Board of Special Inquiry at the Port of San Francisco, and the summary of the proceedings on appeal had before the Board of Review, Bureau of Immigration, Department of Labor at Washington, D. C., respectively.

In the summary of the proceedings had before the Special Board of Inquiry at the Port of San Francisco the decision denying the detained person the right to enter the United States is based and predicated upon the following discrepancies and inconsistencies:

It is first contended that there are many indications that the testimony regarding the Gock Suey Village, where the detained person is said to have lived all of his life, is fabricated. This is indeed a most unjustified statement to make in view of the fact that the alleged father and the detained person were requested, in the absence of each other, to draw on a sheet of paper a diagram representing the location of the various houses situated in the said village. An inspection of these diagrams shows that they are practically identical, both with reference to the number of houses, the number of toilets, the location of the houses, the location of the toilets, the general direction that the various houses faced and the identity of the house of the detained person and his said alleged father. These diagrams are contained in the Immi-

gration Record on file with this Court and a mere casual inspection of the same will certainly establish the absurdity of any such contention.

It is next contended that while the alleged father and the detained person both drew five toilets in practically the same location on the diagrams representing their home village, the father has the toilets contiguous and the detained person has them slightly separated. Such a contention as this is so obviously without merit that we believe it requires no further comment.

It is also contended that the alleged father testified that there are hedges of trees surrounding the village on both sides and the back, with a bamboo hedge at the front, and the detained person testified that there is a bamboo hedge across the front of the village and some bamboos and trees mixed on the west side or tail, but no barriers of any kind on the back or on the east side. Obviously a hedge is not a barrier and for all that appears to the contrary in the testimony of the alleged father the hedge might not have been sufficiently dense to constitute a barrier. Moreover it is not claimed that the detained person testified that there was a total absence of trees or shrubbery in the back of the village. There certainly is no inconsistency concerning the testimony of either the detained person or the alleged father in this respect, as neither was thoroughly interrogated as to whether or no there were any bamboos or other shrubbery in back of the village.

The next contention is that while the alleged father and the detained person both testified in substantial

accord as to a gate on either side of their village and that the same was enclosed by inserting upright poles, it is contended that the alleged father testified that there were no stone slabs beneath the gateways, the poles being held at the bottom by means of heavy wooden beams, and that the detained person testified that there were slabs of stone beneath both gates and that the poles were held at the bottom by being inserted in these stones. It is very easy to visualize the two gates surrounding a village of this character —they would probably be covered with dirt, weeds and other shrubbery. In the absence of a close examination as to what constituted the footing of these gates it would be impossible for anybody to intelligently answer questions as to the kind of material of which they were constructed. Undoubtedly there probably was some wood used in the footing and there may have been stone, but regardless of what the footings were constructed of there is nothing in the testimony to show that either the alleged father or the detained person ever paid any particular attention to the construction of either of these gates. Frankly the writer of this brief would be unable offhand to state definitely whether the foundation of the front stairs of his residence is composed of brick, concrete or other materials. The importance of the questions, if any, has to do with whether or no there were gates to the village. Both the alleged father and the detained person testified in substantial accord as to the general location and construction of these gates, the methods used to close the gates and the only variance, if any, is on the question as to what the footing, which as has

already been suggested was probably covered with dirt and overgrown vegetation, is composed of. We believe that such a contention as this is of itself proof of the weakness of the position of the immigration authorities in seeking to exclude the detained person.

It is next contended that while both the alleged father and the detained person alleged that there was only one well in the village the alleged father testified that the well is located in front of the village, while the detained person says that the well is neither towards the front nor the back of the village, but is in line with the houses. It must be conceded that both the alleged father and the detained person are in substantial accord as to there only being one well in the village and as to the general location of this well. Whether the well is four or five feet removed from the line of houses is a mere matter of recollection and as such constitutes a matter that both the alleged father and the detained person could be honestly mistaken concerning. Moreover the term "front" as used by the alleged father is a relative term and might well describe any territory to the north of the village.

The next contention is that while the alleged father and the detained person agree that Lee Share Dew's father is buried in the Ngow Hill, his mother in the Bong Hom Hill and his paternal grandparents in Jee Yon Hill, they differ slightly with respect to the location of these various cemeteries from their home village. Direction, of course, is always relative and the main thing to be considered is that they are

absolutely in substantial accord as to the names of the various cemeteries and as to the names of the deceased persons buried in these cemeteries.

It is further contended that the alleged father testified that one neighboring village can be seen from his home village, giving the name of this neighboring village as Doo Nai Hong Village, which, he states, is a little over 1 li to the front or north of his home village. The detained person testified as to the location and distance of this same neighboring village and of being able to see another neighboring village occupied by Woo Family people situated about 3 lis to the south of his home village. The alleged father stated that the village occupied by the Woo Family could not be seen from his home village. Taking into consideration that it is admitted that the village occupied by the Woo Family is three times as far from the home village of the detained person and his alleged father as the Doo Nai Hong Village both testified to as being able to be seen from the home village, the answer to this alleged discrepancy and inconsistency is apparent—the alleged father being an older man is probably unable to see as far as the detained person, who, of necessity, is a considerably younger man.

It is next contended that there is a serious discrepancy between the testimony of the alleged father and the detained person in this, that while both the alleged father and detained person testified in substantial accord as to the location of an open court of the alleged father's house, the alleged father testified that the court had a brick floor, while the de-

tained person testified that the court had a tile floor. We are wondering whether the immigration authorities are familiar with Chinese bricks. We feel that in view of the statement contained in the summary that they are not. A Chinese brick is of course not of the same materials or dimensions of the common American brick. Bricks are made in China by a baking process and are of different sizes, dimensions and character. Tiles, of course, are made in like manner and as a matter of fact there is no difference between a tile and a brick. Moreover it is impossible to translate from the Cantonese dialect of the Chinese language into the English language any distinction between articles so closely allied.

It is claimed that there is a discrepancy between the testimony of the alleged father and the detained person with regard to the school house or social hall in the village. The alleged father testified that this structure contained three rooms, a bedroom, a kitchen and a parlor, and the detained person testified that it contained two rooms, a parlor and a small bedroom on the west side, but that there was a stove located in the parlor. Undoubtedly the parlor is so constructed that a portion of it can be utilized for cooking and, therefore, in the opinion of the alleged father, constituted two rooms instead of one. The main point of inquiry regarding this school house should be its location with reference to the other buildings situated in the village and in this both the detained person and his alleged father are in substantial agreement.

Another contention is made that the detained person and the alleged father are in disagreement in their testimony in that the alleged father testified that he advised the detained person to look for work at the Fook Chong Store, whereas the detained person testified that he procured this employment without suggestion from his alleged father. Taking into consideration that the detained person worked at the store in question for some four years prior to his arrival in this country, it seems rather immaterial as to whether he and his alleged father had previously discussed the advisability of his applying for a position in that establishment. The main thing is that both agree that he worked in that store.

While the alleged father was in China it is claimed that he had a hair cut. The alleged father testified that some roaming barbers who visited his village cut his hair, while the detained person testified that his father had his hair cut at the Som Gop Market. Taking into consideration the length of the alleged father's stay in China, it certainly is not improbable to assume that he had his hair cut on several occasions. It may have been that the detained person was absent from the home village at the time his father had his hair cut by the so-called roaming barbers.

It was also contended that the alleged father testified that a boy by the name of Lee Wah Foon had his head shaved in the parlor of his house by the widow of Lee Ming Yin. The detained person testified that he saw the widow of Lee Ming Yin shave the head of

Lee Wah Foon, but he believed that it was done in the west side bedroom of their house. This is an example of how trifling the alleged discrepancies and inconsistencies are.

It is respectfully submitted that taking into consideration that the alleged father and the detained person were separately examined in the absence of each other by the immigration officials that it would have been absolutely impossible for them to have prepared answers to the questions that were given, for they couldn't possibly have anticipated the question being asked. How could either anticipate the asking of the question concerning the widow of Lee Ming Yin shaving the head of Lee Wah Foon? The same is true of the question as to the detained person being employed in the Fook Chong store in China. Likewise as to the location of the school house and the relative position of the buildings situated in the home village, also as to the construction and locality of the gates and in fact all other matters as to which each was interrogated.

From reading the summary alone, without reference to the testimony, it at once becomes obvious and apparent that the detained person and his alleged father are in substantial agreement concerning all matters. In fact so apparent was this fact that the Reviewing Board in Washington, D. C., in commenting upon the alleged discrepancies and inconsistencies state:

> "However, the outstanding adverse feature of this case is not in the present testimonial dis-

crepancies which alone might not be sufficiently serious to compel an excluding decision."

The Reviewing Board at Washington, D. C., predicated the order excluding the detained person from admission into the United States on testimony that was given on or about August 12, 1924, by the alleged father to the effect that the detained person had two sons and one daughter. Admittedly he had two sons but did not have a daughter. This, however, was a question that the alleged father was testifying to from mere hearsay, as it will be remembered that prior to the time of giving this testimony in 1924 the alleged father had resided in this country continuously from January the 27th, 1902, a period of approximately twenty-two and a half years, without returning to China. He had never seen the detained person during this period of time and of necessity the family relations of the detained person with reference to the number of children that the detained person might have had was merely hearsay as far as the alleged father's personal knowledge was concerned. There is very serious doubt as to whether he ever made any such statement, because when he was interrogated in the instant proceeding he very frankly told the immigration authorities that he did not remember making such a statement and if he had done so that it was incorrect. There certainly could be no reason that would actuate the alleged father in giving any such testimony. Moreover the testimony is not material in that it does not affect the claimed relationship between the alleged father and the detained person, which is the only fact in dispute. Obviously the al-

leged father had no personal knowledge as to the number of the detained person's children.

It will be noticed that the record establishes without conflict that the detained person and the alleged father are in substantial agreement and accord concerning all matters that they testified to and that the record does not present any substantial discrepancies or inconsistencies sufficient upon which to base or predicate an order excluding the detained person from admission into the United States.

IF DISCREPANCIES FORM THE BASIS OF AN EXCLUDING DECISION, THE SAME MUST BE SUFFICIENT TO SATISFY REASONABLE MINDS THAT THE DECISION IS JUSTIFIED.

The detained person was entitled to admission upon proving his claims to a reasonable certainty.

Discrepancies which do not in fact exist or which are the probable result of honest mistake rather than deliberate error, or which are trivial and unimportant, do not constitute evidence warranting denial of the existence of the claimed relationship. If so-called discrepancies form the basis of an adverse decision, the same must be sufficient to satisfy a reasonable mind in reaching the same conclusion.

In *U. S. ex rel. Leong Ding v. Brough,* C. C. A. 2d, December 5, 1927, 22 Fed. (2d) 926, at page 927, the Court said:

> "* * * In Zakonaite v. Wolf, 226 U. S. 272, 33 Sup. Ct. 31, 57 L. Ed. 218, the rule was applied that, if it appeared that there was some evidence, and sufficient to satisfy a reasonable

man, that the Chinese person claiming the rights of American citizenship was not entitled thereto, he must be excluded. But here the evidence does not warrant a reasonable mind holding that the appellant was other than he represented. The result below does not satisfy the requirement of a fair hearing. There is no substantial evidence to support the conclusion below. * * *"

In *Go Lun v. Nagle,* 22 Fed. (2d) 246, C. C. A. 9th, the Court, at page 247, said:

"* * * The examination of the father and prior landed brother covered pretty much the same ground. The three witnesses were in full accord as to their relationship, the history of the family, the home, and its surroundings, in all the infinite detail above set forth. There were some so-called discrepancies in the testimony, however, and because of these admission was denied, and the excluding decision was affirmed on appeal.

We may say at the outstart that discrepancies in testimony, even as to collateral and immaterial matters, may be such as to raise a doubt as to the credibility of the witnesses and warrant exclusion; but this cannot be said of every discrepancy that may arise. We do not all observe things, or recall them in the same manner, and an American citizen cannot be excluded, or denied the right of entry, because of immaterial and unimportant discrepancies in testimony covering a multitude of subjects. The purpose of the hearing is to inquire into the citizenship of the applicant, not to develop discrepancies which may support an order of exclusion, regardless of the question of citizenship.

* * * * * * *

We fully appreciate the narrow limits of the jurisdiction of the courts on habeas corpus proceedings to review decisions of the immigration tribunals; but 'the error of an administrative tribunal may, of course, be so flagrant as to convince a court that the hearing had was not a fair one.' Tisi v. Tod, 264 U. S. 131, 44 S. Ct. 260, 68 L. Ed. 590. Such a case is presented here.

A reading of the entire testimony of the three witnesses leaves not the slightest room for doubt that their relationship was fully established, and that the appellant is a citizen of the United States. A contrary conclusion is arbitrary and capricious, and without any support in the testimony.

In Johnson v. Damon (C. C. A.) 16 Fed. (2d) 65, the court considered discrepancies on which an exclusion decision was based, more important than any disclosed by the present record, and in reference to the excluding decision said: 'The mind revolts against such methods of dealing with vital human rights.' See also, Ex parte Chung Thet Poy (D. C. 13 Fed. (2d) 262, and Johnson v. Ng Ling Fong, supra."

In *Johnson v. Damon,* C. C. A. 1st, 16 Fed. (2d) 65, the Court said:

"This court has by repeated decisions shown its full appreciation of the very narrow limits of the jurisdiction of the courts on habeas corpus proceedings to review the decisions of the immigration tribunals. Cf. Johnson v. Kock Shing (C. C. A.) 3 F. (2d) 889; Ng Lung v. Johnson (C. C. A.) 8 F. (2d) 1020. In many cases this court has felt bound to sustain results grounded

upon a finding of deliberate perjury, when the evidence in support of so serious a proposition seemed inadequate, if weighed as courts and juries are expected to weigh such evidence. But there is a limit beyond which no fact-finding tribunal can go in finding a case made up out of whole cloth. This seems to us such a case.

It falls within the rule stated by Mr. Justice Brandeis in Tisi v. Tod, 264 U. S. 131, 133, 44 S. Ct. 260, 261 (68 L. Ed. 590):

'The error of an administrative tribunal may, of course, be so flagrant as to convince a court that the hearing had was not a fair one.'

The same controlling principle is recognized by this court in Goon Hen Soo v. Johnson (C. C. A.) 13 F. (2d) 82: 'While the discrepancies disclosed by the testimony of the witnesses relate to matters of a seemingly trivial nature, yet, we cannot say as a matter of law that they were not sufficient to justify reasonable minds in arriving at the conclusion reached by the Immigration Board.' Here is a recognition that the discrepancies must be 'sufficient to justify reasonable minds,' etc."

In the case of *Nagle v. Wong Ngook Hong, et al.*, 27 Fed. (2d) 650 (Ninth Circuit), the Court at page 651 of the opinion said:

"Certain discrepancies are relied upon by the Commissioner, but we agree with the lower court that they are either only apparent or insignificant. No group of witnesses, however intelligent, honest and disinterested, could submit to the interrogation to which these witnesses were subjected without developing some discrepancies."

In the case of *Mason ex rel. v. Tillinghast,* 27 Fed. 580, the Court at page 581 of the opinion said:

> "After reading and rereading the record in this case, we think that the immigration authorities acted arbitrarily and unfairly in reaching their decision. There is nothing in the record which would warrant a finding that this American citizen did not have a wife and three sons, as he and the two sons testify.
>
> The case falls under the principle laid down in Tisi v. Tod, 264 U. S. 131, 44 S. Ct. 260, 68 L. Ed. 590: 'The error of an administrative tribunal may, of course, be so flagrant as to convince a court that the hearing had was not a fair one.' It is, in effect ruled by our decisions in Fong Tam Jew v. Tillinghast, (C. C. A.) 24 F. (2d) 632; Johnson v. Ng Ling Fong (C. C. A.) 17 F. (2d) 11, 12; Johnson v. Damon (C. C. A.) 16 F. (2d) 65; Chan Sing v. Nagle (C. C. A.) 22 F. (2d) 673, 674; Cf. Kwock Jan Fat v. White, 253 U. S. 454, 464, 40 S. Ct. 566, 64 L. Ed. 1010; Chin Yow v. United States, 208 U. S. 8, 28 S. Ct. 201, 52 L. Ed. 369; Go Lun v. Nagle (C. C. A.) 22 F. (2d) 246; United States ex rel. Leong Ding v. Brough (C. C. A.) 22 F. (2d) 926; Whitefield v. Hanges (C. C. A.) 222 F. 745; In re Chung Thet Poy (S. C.) 13 F. (2d) 262."

Also *Lew Sun Soon v. Tillinghast,* 27 Fed. 775, where it was held that a finding of the immigration tribunal that the alien applying for admission as a son of a citizen was not entitled to admission, based on certain inconsistencies between certain statements of the applicant and those of his brother respecting collateral matters was unreasonable and arbitrary so

as to constitute a lack of a fair hearing. The inconsistencies before the Court consisted (1) the question of whether or no the school houses in the village were attached or detached, (2) with respect to the lighting and arrangement of the ancestral hall where both brothers attended school, and (3) the balconies on rooms in the family home.

Commenting on these discrepancies, the Court at page 776 of the opinion said:

> "Obviously these matters had no bearing on the real issue."

It is interesting to note that the discrepancies relied upon in the case of *Lew Sun Soon v. Tillinghast,* supra, are practically the same as those relied upon in the instant case.

In the case of *Ng Yuk Ming v. Tillinghast,* 28 Fed. (2d) 547, the citizenship of the father, like in the instant case, was conceded, but the relationship denied. In that case the applicant's testimony disagreed with the father in the following respect:

> (1) Whether the applicant slept in the school house or at the family home during the father's stay in China;
>
> (2) The description of the school house and the identity of a number of families of certain near neighbors;
>
> (3) The question of whether the father visited the applicant at the school and the description of the room while there;
>
> (4) Whether they slept at school; and
>
> (5) The question as to whether a door keeper was maintained at the school or otherwise.

Obviously all of these discrepancies were much more important than those presented in the instant case, yet the Court in commenting upon the character of the alleged discrepancies held that the discrepancies relied upon by the immigration authorities relate to collateral matters, all of which are of such a trifling nature as to furnish no substantial evidence for reaching contrary conclusions as to the rights of the applicant.

Mr. Justice Rudkin in rendering a recent decision in this Court in the case of *Wong Tsick Wye v. Nagle,* 33 Fed. (2d) 226, had occasion to specifically point out a number of discrepancies which, in his opinion, would not constitute material inconsistencies that would justify a deportation. It will be noticed that none of the discrepancies presented in the instant case are as material on any question presented as those considered by Justice Rudkin and found by him to merely constitute collateral or trifling variances.

See, also:

Nagle v. Dong Ming, 26 Fed. (2d) 438, C. C. A. 9th;

Ex parte Jew Yet Chew, 25 Fed. (2d) 886, D. C. of Mass.;

Fong Tam Jew v. Tillinghast, 24 Fed. (2d) 632, C. C. A. 1st;

Johnson v. Ng Ling Fong, 17 Fed. (2d) 11, supra;

Johnson v. Damon, 16 Fed. (2d) 65, C. C. A. 1st;

Ex parte Chan Thet Poy, 13 Fed. (2d) 262, D. C. of Mass.;

Chin Gum Wing v. Johnson, 13 Fed. (2d) 124, C. C. A. 1st.

In *Johnson v. Ng. Ling Fong,* C. C. A. 1st Circuit, 17 Fed. (2d) 11, the Court said:

> "The records in the Immigration Department concerning the alleged father and his family since 1909 are so complete, and the statements as to the number and births of his children have been so consistent, through this long period of time, that it is inconceivable that fair-minded men, free from bias and suspicion, should entertain any reasonable doubt as to the relationship of the applicant and the alleged father. * * *"

In the case of *Nagle v. Wong Ngook Hong, et al.,* 27 Fed. (2d) 650, C. C. A. 9th, the applicants were excluded because the relationship was not established, based upon "8 major discrepancies." The applicants were discharged by the District Court and its decision affirmed by the Circuit Court of Appeals. The Court (C. C. A.) said:

> "Owing to the wide range of the examination of the several witnesses, repetition, and minute detail, the records are voluminous. Certain discrepancies are relied upon by the Commissioner, but we agree with the lower court that they are either only apparent or insignificant. No group of witnesses, however intelligent, honest, and disinterested, could submit to the interrogation to which these witnesses were subjected without developing some discrepancies."

IF THE DETAINED PERSON BE NOT ACCORDED A FAIR HEARING BEFORE THE IMMIGRATION AUTHORITIES, HE IS ENTITLED TO BE DISCHARGED ON HABEAS CORPUS.

It must be considered, as well settled, that if the decision of the immigration authorities has not been arbitrarily or unfairly reached, the Courts cannot go into the merits and set the decision aside.

Low Wah Suey v. Backus, 225 U. S. 460, 468, 32 Sup. Ct. 734, 56 L. Ed. 1165;

Lewis v. Frick, 233 U. S. 291, 300, 34 Sup. Ct. 488, 58 L. Ed. 967.

It is, however, equally well settled that if the immigration authorities act in an arbitrary or unfair manner and there is no substantial evidence upon which an adverse decision may be based, or the decision is contrary to law, the Courts have the right to set the decision aside and order the detained person discharged. The decision of these officials must find adequate support in the evidence.

Kwock Jan Fat v. White, 253 U. S. 454, 458, 40 Sup. Ct. 566, 64 L. Ed. 1010;

Zakonaite v. Wolf, 226 U. S. 272, 274, 33 Sup. Ct. 51, 57 L. Ed. 218;

Geigow v. Uhl, 239 U. S. 3, 9, 35 Sup. Ct. 661, 59 L. Ed. 1493, supra.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the judgment and order appealed from should be reversed.

Dated, San Francisco,
September 16, 1931.

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Attorney for Appellant.